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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 392

IRVING J. McCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 178–202) is reported at 169 F. 2d 776.

JURISDICTION

The judgment of the Court of Appeals was entered August 24, 1948 (R. 203), and a petition for rehearing was denied October 8, 1948 (R. 204). The petition for a writ of certiorari was filed November 2, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner was entitled to have the trial court instruct the jury specifically upon the subject of circumstantial evidence.

STATEMENT

On October 8, 1946, a two-count indictment was filed against petitioner in the District Court for the District of Montana charging that he had knowingly caused false statements to be presented to the United States Government in violation of 18 U. S. C. 80 (Sec. 35 (A) Criminal Code, now 18 U. S. C. 1001). The alleged false statements were to the effect that certain Army surplus trucks, being sold by the Government under the provisions of Sec. 16 of the Surplus Property Act of 1944, as amended (60 Stat. 168; 50 U. S. C. App. 1625), were to be purchased by a veteran for use in his own small business, whereas in truth they were to be used in the business of petitioner, who was not a veteran. (R. 2–4.) The first count was dismissed for insufficiency of the evidence, but the jury returned a verdict of guilty on the second count and petitioner was sentenced to imprisonment for two years (R. 121–124, 165–167). The judgment was affirmed by the Court of Appeals for the Ninth Circuit sitting *en banc* (R. 203).

The evidence for the Government may be summarized as follows:

Three government officials testified that a surplus property sale was held in Butte, Montana, on March 27 and 28, 1946, attendance at which was limited to veterans of World War II (R. 8–14); that the veterans were required to qualify for admission to the sale (R. 17); that one, Frederick Browning, submitted a signed application to be allowed to purchase certain surplus property, in which he certified that he was a veteran and that the surplus property applied for was "to be used in and as part of" Gallatin Industries, the major part of which enterprise was owned by veterans (R. 33, 35–36, 42–43; see also R. 90–92). Immediately above Browning's signature the application form contained a warning that it is a felony to make wilfully a false statement to a government agency in a matter within its jurisdiction (R. 91). Browning, who is a veteran (R. 39–40), purchased two trucks at the sale (R. 19–24).

Sylvester Lahren, a veteran, testified that petitioner drove him from Livingston, Montana, to several surplus sales for veterans on the Pacific Coast and in Montana (R. 48–68); that it was understood petitioner was to pay half of any purchase made by Lahren (R. 59); that petitioner suggested the purchases to be made, helped him fill out the veterans' application form, and was aware of the contents of the application form

(R. 61–63); that petitioner accompanied other veterans to the sales and remarked that the more veterans he had the more chance he had of getting equipment (R. 68–70); and that before he testified at the trial he received a note from petitioner suggesting that it would be better for him to change his story (R. 71–75; cf. R. 44–47).

Browning testfied that he is a veteran and an officer of Gallatin Industries, which is controlled by veterans (R. 77–79); that he wanted to obtain some trucks for use in connection with Gallatin Industries (R. 81, 85); that petitioner advised him what type of truck to purchase, went with him to the Butte sale, inspected the equipment, agreed to finance the purchase and gave him cashier's checks to make full payments for the two trucks he bought (R. 81–84; cf. 98); that he executed no note to petitioner but simply had an oral agreement with him before the purchase that the trucks were to be used to haul rock for Gallatin Industries, that Gallatin Industries was to pay petitioner so much per yard of rock hauled until petitioner was reimbursed, and that thereafter he and petitioner would each own a half interest in the trucks (R. 85–86); that petitioner's son took delivery of the trucks (R. 85); that both trucks were stored in petitioner's garage and that the witness had never exercised control over them or received any compensation for their use (R. 86–88); and that only one of them had been

registered in his name (R. 88). The witness admitted signing the application in which he stated that the trucks were "to be used in and as part of" Gallatin Industries (R. 88–94). There was other evidence that only one of the two trucks bought by Browning was registered in his name, and on that registration Browning's address was "in care of" petitioner (R. 111–113).

John Sexton testified that he is a veteran, that he also purchased a truck at the Butte sale, that petitioner financed the purchase, and that petitioner was to operate the truck until it had been paid for after which petitioner and the witness would each own a half interest in it (R. 99–104).

Petitioner did not take the stand and offered only one character witness in his defense (R. 124–125). It was stipulated that petitioner is not a veteran (R. 76–77).

Defense counsel requested that the following instruction be given the jury (R. 158–159):

> You are instructed that where a conviction is sought upon circumstantial evidence, all the incriminating circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. If there is any single fact proved which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and you should acquit the defendant.

This instruction was refused. In his general charge, however, the trial judge took rather unusual pains in explaining that the jury must be convinced beyond a reasonable doubt before it could return a verdict of guilty (R. 135, 136, 137, 139–141, 146, 147, 153, 155).

In the Court of Appeals petitioner argued, among other things, that practically all the evidence against him was circumstantial in nature and that the trial court should, therefore, have given the requested instruction on that subject. The Court of Appeals, however, held that the instruction was unnecessary. The opinion points out that there was considerable evidence of both types, direct and circumstantial, in the case. The opinion goes on to cite with approval two cases from the Second Circuit[1] which indicate that an adequate instruction that the evidence must show guilt beyond a reasonable doubt is sufficient in any case, and that a special instruction on the effect to be given circumstantial evidence is only confusing to the jury. The opinion then concludes that the trial court's charge in this case clearly instructed the jury that they could not convict petitioner unless they were convinced of his guilt beyond a reasonable doubt and unless they found that guilt was the only reasonable

[1] *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, certiorari denied, 279 U. S. 863; *United States* v. *Becker*, 62 F. 2d 1007.

conclusion to be drawn from the evidence (R. 195–202).

ARGUMENT

Petitioner contends that the elements of the charge of the indictment were established by circumstantial evidence alone (Pet. 13–15). He argues that, where the prosecution depends mainly upon circumstantial evidence, it is wrong in principle (Pet. 22–23) and contrary to the weight of authority (Pet. 21–22) to refuse to instruct the jury that, before a conviction can be had upon such evidence, it must be so strong as to exclude every other reasonable hypothesis but that of guilt. He contends that certiorari should be granted to settle the asserted conflict on this point between the present decision and the two Second Circuit cases cited above,[2] on the one hand, and several decisions from the Fourth and Fifth Circuits on the other.[3]

It is generally said that when the evidence for the prosecution is chiefly circumstantial, the defendant is entitled to a specific instruction on the nature of that evidence, over and above the usual instruction on reasonable doubt, to the effect that conviction can only be had if the evidence is inconsistent with every other reasonable

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[2] See footnote 1, *supra*.

[3] *Stutz* v. *United States*, 47 F. 2d 1029 (C. C. A. 5); *Anderson* v. *United States*, 30 F. 2d 485 (C. C. A. 5); *Garst* v. *United States*, 180 Fed. 339 (C. C. A. 4).

hypothesis but that of guilt. Randall, *Instructions to Juries,* §§ 226, 233–234; Branson, *Instructions to Juries* (3rd ed. 1936), § 65; Note, 89 A. L. R. 1379. With this rule the decisions of the Second Circuit, quoted with approval by the court below (R. 196–198), appear to be in conflict. Thus in *United States* v. *Becker,* 62 F. 2d 1007, 1010, the Second Circuit held that where the jury have been clearly told in a circumstantial evidence case that they must be satisfied beyond a reasonable doubt of the defendant's guilt, it is only confusing to the jury to draw a distinction between circumstantial and direct evidence. See also *United States* v. *Valenti,* 134 F. 2d 362, 364–365, certiorari denied, 319 U. S. 761; and cf. Wigmore, *Evidence* (3rd ed. 1940), §§ 25–26, 2497.

But we think the point of asserted conflict is not reached in this case for, as the court below pointed out (R. 196), the Government did not rely wholly or mainly upon circumstantial evidence to establish the fact that a false statement had been presented by Browning, aided and abetted by petitioner. And it is undisputed that it is not error to refuse to instruct the jury on circumstantial evidence where the proof is, at least in part, direct. *Campbell* v. *United States,* 47 F. 2d 70, 71 (C. C. A. 5); *Herman* v. *United States,* 48 F. 2d 479, 480 (C. C. A. 5); *Sloan* v. *United States,* 31 F. 2d 902, 906 (C. C. A. 8);

Portman v. *United States*, 34 F. 2d 406, 408 (C. C. A. 8); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C. C. A. 8), certiorari denied, 281 U. S. 723; *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C. C. A. 9); *McMillan* v. *United States*, 27 F. 2d 94, 96 (C. C. A. 8); Randall, *Instructions to Juries*, §§ 226–227; Branson, *Instructions to Juries*, § 65.

The evidence establishing presentation of the false statement by Browning and aiding and abetting by petitioner was largely direct; the circumstantial evidence was either confirmatory of this or offered in proof of petitioner's intent. Thus, there was direct evidence that Browning submitted a statement to the effect that the trucks he sought to purchase were to be used "as a part of" Gallatin Industries (R. 33, 35, 42, 83, 88–91). Browning himself admitted that the trucks were not to be Gallatin Industries' property, but were to belong equally to petitioner and himself, while Gallatin Industries was to pay for their use (R. 85–86). There was also direct evidence that petitioner drove Browning to the sale (R. 68–69, 83); that petitioner advised Browning what type of truck to apply for, inspected the trucks with him, and approved the selection (R. 81, 83, 97); and that petitioner agreed prior to the sale to finance Browning's purchase and gave him two cashier's checks in full payment

for the trucks after they had been purchased (R. 82, 84–85). Certainly this direct evidence clearly established that petitioner had aided and abetted the presentation of Browning's statement. This evidence, as well as the evidence concerning petitioner's transactions with other veterans and his custody and control of the trucks in question, was, it is true, circumstantial in proving his knowledge of the falsity of Browning's statement; but it is also true that, absent a direct admission, intent, knowledge or purpose can only be proved by such evidence. And where, as here, the corpus delicti is established by direct evidence, the fact that the proof of intent is circumstantial does not entitle the defendant to the special instruction. Randall, *Instructions to Juries,* § 227.

We think, then, that this is not a case in which petitioner was entitled to a specific instruction on the effect of circumstantial evidence, and that the trial court was correct in refusing the requested instruction. The trial court took exceptional pains, as we have already pointed out (*supra,* p. 6), to impress upon the jury that they could not convict petitioner so long as they had any reasonable doubt of his guilt. Petitioner points to one sentence in the lengthy (R. 126–156) charge which, when taken out of context, might seem to have warranted the jury in convicting merely because the inference of guilt seemed more

probable than the inference of innocence (Pet. 15–17; R. 137). But the jury had just been told that they should acquit if the inference of innocence was a reasonable one (R. 137). And they were carefully and repeatedly told that they could not convict merely because the inference of guilt seemed more probable. Thus the Court said (R. 140):

> * * * you of course cannot convict the defendant on conjectures however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt; that is, upon proof such as logically compels the conviction that the charge is true, because suspicions are not evidence, neither are conjectures, probabilities or possibilities. It must be evidence. That is what the law says and that is what it must be, and suspicions and conjectures and probabilities are not in any sense of the word evidence.

Whatever may be said of the validity of the Second Circuit's view that a specific instruction is unnecessary in a case developed by purely circumstantial evidence, that issue is not presented by the facts of this case. Petitioner had the benefit of a very fair and painstaking charge and was not entitled, in addition, to the special instruction he requested.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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